Supreme Court, U.S.
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No. 93-1972

SUPREME COURT OF THE UNITED STATES

October Term, 1993

ANDREW LEO LOPEZ,

Petitioner,

vs.

DANIEL J. BEHLES, *et al.*,

Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

PETITIONER'S REPLY BRIEF

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PETITIONER'S REBUTTAL ARGUMENTS

General Items

Respondents confuse Debtor[s], two corporations with the Debtor-in-Possession a natural person with fiduciary duties to the creditors of the estate[s] including Petitioner.

The Debtor corporations were never represented by anyone during the pendency of the proceeding under Chapter 7 of the U.S. Bankruptcy Code except the Trustee who is one of two respondents in this action and a corporation may not appear *Pro Se* [See Respondent's Brief at p. 20].

Petitioner was never an employee of the Debtors-in-Possession [R.B. at p. 1, ¶ 3] but of the Debtor's estates.

Respondents [R.B. at p. 2, ¶ 7] admit that the parties including both fiduciaries, Trustee and Debtor-in Possession [not the Debtor corporations] made a deal amongst themselves [R.B. at p. 26 & Exhibit 4] before asking the

Court to lift the stay on assets previously abandoned by the Trustee [R.B. at p. 2, ¶ 6] without notice to anyone and before allegedly soliciting bidders to maximize value.

Petitioner [R.B. at p. 1, ¶ 5] did not enter an appearance in the sense of a newcomer to the case, but only to enter formally the mailing list [matrix] because mailings were previously sent to the Debtors' attorney who had withdrawn.

Respondent Trustee [R.B. at p. 2, ¶ 6] abandoned assets that were collateral for Respondent Western Bank and assets that were collateral for Val and Sons who never contested Petitioner's appeals of the matter. In neither case did Trustee give notice or provide any economic analysis except his own conclusory testimony, that the value of the assets was less than the notes against the assets.

Respondents [R.B. at p. 2, ¶ 8] correctly state that Petitioner appeared at a hearing that took place on May 10, 1991, but neglect to state

that he did not receive notice until two days before the hearing and the rules require 20 days of notice. Thus, Petitioner could have no time to prepare for a complex valuation or engage an appraiser of mining equipment pursuant to 11 U.S.C. 362(q)(2) to value the estate or its assets.

Respondents concentrate on matters of interest to Respondent Western Bank but ignore the live controversy before the Court involving the abandonment of collateral by the Trustee without notice that was purchased by its secured creditor of Val and Sons which never contested any of Petitioner's averments nor even filed papers of any kind in any of the actions to date including this one. In other words even if one part [and none herein are] of a controversy is moot not all other parts are moot.

Petitioner is an administrative claimant who is not an unsecured creditor in the usual sense of a trade creditor in the ordinary course of business and his claim is perfected without

need [R.B. at p. 10] of a fee application. The argument is utterly specious especially in view of the fact that Petitioner filed his proof of claim upon motion by the Trustee more than three years ago and the time to object lapsed long ago.

Respondents [R.B. at p. 3, ¶ 9] mention the Court's Order [R.B. at pp. 20-25], but neglect to state that the Order was prepared by John F. Caffrey [R.B. at p. 25] for Respondents which was literally rubber-stamped by someone in the Court's offices. This Court and numerous other courts properly look askance at orders prepared by litigants and this Order bears the embellishments that courts worry about:

a) R.B. p. 20. The Debtor did not and could not appear *Pro Se*;

b.) R.B. p. 21, ¶ 2. Notice was not mailed timely;

c.) R.B. p. 23, ¶ 9. Testimony of value pursuant to 11 U.S.C. § 362(q)(1) was bank loan officer who made original loan, who now said

equipment was worth about 25 cents on the dollar, but who loaned all of the amount due [Petitioner's Reply Brief at Appendix A-1 and R.B. at p. 26 and Exhibit 4] and possibly more taking only the equipment as collateral and the signatures of the same or fewer guarantors as before. Court allegedly in its Order found that [R.B. at p. 3, ¶ 10] found no equity and value less than debt, but bank loaned at least the entire amount of the debt to the Debtor-in-Possession and another former guarantor. Thus did the bank establish the minimum value of the collateral with depositor's money no less;

d.) R.B. at p. 23, ¶ 10. The Court refused to schedule pursuant to 11 U.S.C. § 362(e) a timely hearing even though objections were filed timely;

e.) R.B. at p. 23, ¶ 11 fails to state that failure to give timely notice [two days before hearing] prevented Lopez from compliance with 11 U.S.C. § 362(q)(2) and that Respondent

Western Bank has the burden of proof under 11 U.S.C. § 362(q)(1).

Respondents [R.B. at p. 3, ¶ 11] admit a private sale and [P.R.B. at A-1; R.B. at pp. 26-27; R.B. at p. 29; R.B. at p. 30?, Exhibit 4] show that there was a preferred purchaser and Respondents acted in concert with the blessing of the Court to chill the bidding and rig the bidding so that there could only be one outcome: sale to the former Debtor-in-Possession who owed Western Bank for other loans [i.e. if Debtor-in-Possession acquires valuable, money-making assets from Western Bank, he is much better able to pay the other loans and of course keep perhaps as much as $1,000,000 of annual deposits at the bank].

Respondents [R.B. at p. 4, ¶ 12] cite Exhibit 3 [there are two 3's] at page 29 as an example of a public notice. The information given is ludicrous and the Court needs but compare with Exhibit 4 facing page 29.

Respondents [R.B. at p. 4, ¶ 13] claim a legal notice in a periodical [newspaper published only each Friday] published only for legal notices despite its name. The affidavit [R.B. at Exhibit 4] which was confirmed by Petitioner's telephone call shows publication only once on Friday, May 24, 1991 where and when few if any potential bidders would notice and only five days, including the weekend, before the transaction was to close with the preferred bidder.

There were [R.B. at p. 4, ¶ 14] no other bidders because Respondents had pre-qualified the former Debtor-in-Possession [P.R.B. at A-1]; had arranged to finance the purchase for at least the amount due; had arranged for financing from Western Bank prior to the public notice; had failed to give timely notice to anyone else of available bank financing for the bid price; had failed to give timely and informative notice to other potential bidders in publications where this kind of equipment is normally offered for

sale; had only announced the impending sale; had solicited by announcing a done deal five days before closing and stating that anyone else had to come up with more cash or a certified check for more than the contemplated closing price. Thus, did Respondents, the Bankruptcy Court and the former Debtor-in-Possession rig the sale, rig the bid and eliminate every other possible bidder and foist a legal fraud on the creditors with the full acquiescence of the Court which was trying to bury a wrongful conversion with the help of the Trustee and Western Bank.

Respondents' comment [R.B. at p. 17] about Petitioner's alleged conduct at hearings is ludicrous and without a scintilla of support anywhere in the record and but a transparent, tawdry attempt to prejudice this Court.

Respondents' [R.B. at p. 17] comments about Petitioner's attendance at hearings without objection from Respondents or anyone else and with the approval of the Bankruptcy Court

suggest constructive application of Bankruptcy Rule 2018(a).

Standing

As a general rule, creditors have standing to appeal Orders of the Bankruptcy Court disposing of property of the estate because such Orders directly affect the creditors' ability to receive payment of their claims. *Kane v. Johns-Manville Corp*, 843 F.2d 636, 642 (2nd Cir. 1988).

The general rule, well settled, applies even when the *schema* of payment priorities drops an administrative claimant in a Chapter 11 proceeding below the claims of administrative [R.B. at p. 10] claimants in an involuntary conversion to Chapter 7.

The principle of trustee representation is not always strictly applied, *Matter of Carbide Cutoff, Inc.*, 703 F.2d 259, 264 (7th Cir. 1983); See also In Re *Tyne*, 261 F.2d 249, 251 (7th Cir. 1959) and one court refused to apply the principle to a case involving a claimant [as

here], not a creditor in the ordinary sense of the word [as here] whose interests were adverse [as here] to the trustee, In Re *Huntingdon & Broad Top Mountain R.R. & Coal Co.*, 213 F.2d 411, 415 and another court allowed an appeal to proceed where no objection [to standing] was raised [as here] in the court below. ***Tyne*** at 252.

If the objecting party did not [as here] receive proper notice of the proceedings below and of his opportunity to object to the action proposed to be taken, the requirements of due process outweigh those of judicial efficiency and certainty. In Re *Commercial W. Fin. Corp.*, 761 F.2d 1329, 1335 (quoting R. Levin Bankruptcy Appeals, 58 N.C.L. Rev. 967, 978 (1980)).

Notice must be provided to "all creditors at least 20 days in advance. In Re *Globe Investment & Loan Co.*, 867 F.2d 556, 560 (9th Cir. 1989).

Further, the financing arrangements [100.0% by the bank holding the collateral] and sale

back to the Debtor-in-Possession strongly suggest that the collateral was worth more than the purchase price and a *bona fide* auction would produce a surplus for the creditors.

In the *Matter of Andrerccetti*, 975 F.2d 413 (7th Cir. 1992) an appellant was held to have standing to appeal based [as here] upon his interest that arose from the Trustee's settling of suits for less than what would be needed to create a surplus. Long before the issue of standing arose Lopez stated that if his appeal were successful, he would pursue or cause to be pursued those claims against third parties which Lopez views as likely to produce residual value to the Debtors. *Id.* at 417.

Finally, Petitioner perfected his claim [R.B. at pp. 11-12] years ago and need not yet file an application to be paid in a case which remains open.

Therefore, this Court should issue a *Writ*.

Mootness

When a bankruptcy court authorizes a sale of assets pursuant to Section 363(b)(1) [as here], it is required to make a finding with respect to the "good faith" pursuant to 11 U.S.C. § 362(m) of the purchaser. In Re *Abbotts Dairies of Pennsylvania, Inc.*, 788 F.2d 143, 149-50 (3rd Cir. 1986) and absent [R.B. at pp. 20-25] a finding of good faith an appeal is not moot, ***Abbotts*** especially where a Debtor-in-Possession violated his fiduciary duties to the Debtors' creditors. ***Id.*** at 151.

For judicial notice John F. Caffrey, Esq. prepared and filed the Order of the Bankruptcy Court which someone later rubber stamped. Thus despite every single advantage that a stacked court could provide, Respondents fail a key test: no finding of "good faith."

"Typically, the misconduct [See General Items *Supra*] that would destroy a purchaser's good faith status at a judicial sale involves fraud, collusion between the purchaser and other

bidders or the trustee, or an attempt to take grossly unfair advantage of other bidders." In Re *Rock Industries Machinery Corp.*, 572 F.2d at 1198.

Moreover, the Bankruptcy Court's failure to find and conclude "good faith" precludes the necessity of obtaining a stay from a court which was doing everything possible to quickly bury a wrongful conversion.

In addition, the mootness rule does not prevent the hearing of an appeal [as here] where monetary relief is sought. *American Grain Assoc. v. Lee Vac Ltd.*, 630 F.2d 245, 248 (5th Cir. 1980).

Further, in *Wolverton v. Shell Oil Company*, 442 F.2d 666, 669-70 the Court refused to uphold a private sale to a bankrupt [here a Debtor-in-Possession who later went bankrupt] because of the great potential for skulduggery.

In *Sullivan Central Plaza I, Ltd.*, 914 F.2d 731, 734 (5th Cir. 1990) the Court stated, "The buyer [other parties as well] is readily on

notice that he is not entitled to rely on the finality of the foreclosure sale when all parties are before the Court [as here] and there is evidence of misconduct [as here] in the foreclosure" and the Court specifically held that wrongful foreclosures may be reversible. ***Id.***, See *Henke v. First Southern Properties, Inc.*, 586 S.W.2d 617.

Because the record shows collusion to rig a sale and all parties are before this Court, the Court has the power to exercise its equitable jurisdiction to sift the circumstances surrounding any claim to see that injustice is not done in the administration of the bankrupt estate, *Pepper v. Litton*, 308 U.S. 295, 307-08, 60 S.Ct. 238, 245-246, this Court should issue a *Writ*.

Trial Court Recusal

Most of Respondents' citations in the matter of recusal consider 11 U.S.C. § 144 and not 11 U.S.C. §§ 455(a) and 455(a)(1). Therefore, they help not Respondents' position.

Petitioner's challenge of the bankruptcy judge arises from his abuse of discretion, *Jaffree v. Wallance*, 837 F.2d 1461, 1465 (11th Cir. 1988) in denying Petitioner's Motion to Recuse grounds for which are found in the record of the Court's conduct of the case and prejudice arising from evidence that was improperly introduced [See Petition at p. A-11] which produced [uncontested] a biased court.

Further, this Court should consider and settle the standing of all professional employees of a bankruptcy estate to move a bankruptcy court for recusal of the presiding judge where circumstances warrant.

Moreover, Respondents fail to address the issue of the duty of a professional employee who is a Certified Public Accountant to preserve the estate of a debtor and his standing to discharge the duty by challenging the wrongful orders of a bankruptcy court by appeal to a higher court.

The standard of recusal under 28 U.S.C. §§ 455(a) and 455(b)(1) is whether a reasonable

person, knowing all of the facts, would conclude that the Court's impartiality might reasonably be questioned. In Re *Drexel Burnham Lambert, Inc.*, 861 F.2d at 1313 (construing 455(a)); *Apple v. Jewish Hospital and Medical Center*, 829 F.2d at 333 (construing 455(b)(1)); See also *Liljeberg v. Health Services Acquisition Corp.*, 486 U.S. 847, 108 S.Ct. 2194, 2201 N.7. (1988).

Thus, the test to be applied is an objective one which assumes that a reasonable person knows and understands all the relevant facts. *Pepsico, Inc. v. McMillen*, 764 F.2d 458, 460 (7th Cir. 1985); *Hinman v. Rogers*, 831 F.2d 937, 939 (10th Cir. 1987). Moreover, in *Liljeberg* this Court emphasized that in amending 28 U.S.C. § 455(a) Congress aimed to promote public confidence in the judiciary by avoiding even the appearance of impropriety.

Under the broader standard of revised 11 U.S.C. § 455(a) disqualification is appropriate not only where there is actual or apparent bias or prejudice, but also when the circumstances

were such that the judge's "impartiality might be reasonably questioned." See *13 Wright, Miller & Cooper*, Federal Practice and Procedure; Jurisdiction, § 3549; *United States v. Ritter*, 540 F.2d 459, 462, cert denied S.Ct. 370 (10th Cir. 1976); See also *United States v. Gigax*, 605 F.2d at 511.

Moreover, the Tenth Circuit quoting with favor in *United States v. Page*, 828 F.2d 1476, 1481 (10th Cir. 1987), "The Fifth Circuit has enunciated an exception to the requirement of extrajudicial bias, when "such persuasive bias and prejudice is shown by otherwise judicial conduct as would constitute bias against a party" and "A judge's participation in a given case may on occasion form the basis for a finding of bias." *Blizzard v. Fielding*, 454 F.Supp. at 721; See also *Ouchita Nat. Bank v. TOSCO Corp.*, 686 F.2d 1291, 1301 (1982).

Therefore, where a bankruptcy judge has made a wrongful conversion [undisputed] from reorganization to liquidation under the

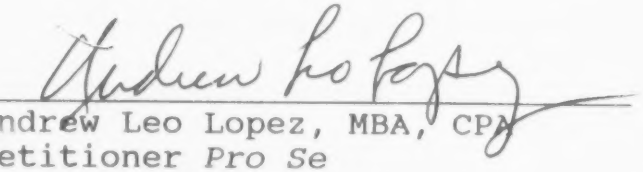
bankruptcy code and sought to cover the matter with specious findings of fact and conclusions of law [undisputed] he can not hold the balance nice, clear, and true between Petitioner and opposing parties, *Tumey v. Ohio*, 273 U.S. 510, 532, 47 S.Ct. 437, 44, nor can he hold the balance between vindicating the interests of the Court and the interests of the Petitioner, *Ungar v. Saravite*, 376 U.S. 575, 588, 84 S.Ct. 841, 845 (1964), he should be ordered from the case by this Court and this Court should issue a *Writ*.

CONCLUSION

Because there are live controversies before this Court in a bankruptcy case involving serious matters which affect millions of pending cases and billions of assets this Court should issue a *Writ of Certiorari* to the Tenth Circuit, stay pending resolution of the *Writ* publication of the opinion under review, reverse the Judgment of the United States Court of Appeals for the Tenth Circuit, and order such other and

further relief as the Court may find just under these premises.

Respectfully submitted,



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APPENDIX A

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

ANDREW LEO LOPEZ, MBA, CPA,

Plaintiff-Appellant,

vs. CIVIL NO. 91-532 JP/RWM

DANIEL BEHLES, Trustee for
American Ready Mix, Inc., and
Albuquerque Sand and Gravel Inc.,
and WESTERN BANK,

Defendants-Appellees.

APPELLEE WESTERN BANK'S RESPONSE TO
APPELLANT'S MOTION TO RECONSIDER
APPELLEE'S MOTION TO DISMISS APPEAL

COMES NOW Appellee Western Bank by and through its attorneys Dubois, Caffrey, Cooksey, Bischoff, P.A. (John F. Caffrey) and in response to the Motion of Appellant Andrew Leo Lopez to reconsider the decision of the Court granting Appellee's Motion to Dismiss Appeal, filed on or about January 16, 1992, states as follows:

Appellee wishes to dispute the statement made in Paragraph 4 of Appellant's Motion which stated:

> "In oral argument before the Magistrate Court Appellee's counsel, John F. Caffrey, Esq. admitted Appellant's accusation of bid rigging;"

This statement is factually untrue. What was stated at the hearing before Judge McCoy was that the collateral was to be sold to a new corporation formed by the guarantors of the original loan who had arranged and pre-qualified for a new loan equal to the balance of the original loan. Only a higher cash offer would defeat this sale. This is not "bid-rigging" nor has there ever been an admission that this conduct constitutes "bid-rigging" or any other type of impermissible conduct.

Appellant's Motion and argument ignores the mootness issue and, instead, argues the alleged merits of the appeal and does not suggest how the Court's decision is improper.

WHEREFORE, Appellee respectfully prays that the Court deny the Appellant's Motion to reconsider the Court's decision granting

Appellee's Motion to dismiss the appeal as being moot.

DUBOIS, CAFFREY, COOKSEY & BISCHOFF, P.A.

BY: _____

John F. Caffrey
2040 4th Street, NW
Albuquerque, NM 87102
(505) 243-6721

I HEREBY CERTIFY that a true and correct copy of the foregoing was mailed to:

Andrew Leo Lopez
P. O. Box 12035
Albuquerque, NM 87195

on January 21, 1992.

_____
John F. Caffrey

APPENDIX B

STATUTES AND VERBATIM CONTENT

11 U.S.C. § 362(e)

(e) Thirty days after a request under subsection (d) of this section for relief from the stay of any act against property of the estate under subsection (a) of this section ....

11 U.S.C. § 362(g)(1)

(1) The party requesting such relief has the burden of proof on the issue of the debtor's equity in the property;

11 U.S.C. § 362(g)(2)

(2) The party opposing relief has the burden of proof on all other issues.

11 U.S.C. § 363(m)

The reversal or modification on appeal of an authorization under subsection (b) or (c) of this section of a sale or lease of property does not affect the validity of a sale or lease under such authorization to an entity that purchased or leased such property in good faith, whether or not such entity knew of the pendency of the

appeal, unless such authorization and such sale or lease were stayed pending appeal.

28 U.S.C. § 144

Whenever a party to any proceeding in a district court makes and files a timely and sufficient affidavit that the judge before who the matter is pending has a personal bias or prejudice either against him or in favor of any adverse party; such judge shall proceed no further therein, but another judge shall be assigned to hear such proceeding.

The affidavit shall state the facts and the reasons for the belief that bias or prejudice exists, and shall be filed not less than ten days before the beginning of the term [session] at which the proceeding is to be heard, or good cause shall be shown for failure to file it within such time. A party may file only one such affidavit in any case. It shall be accompanied by a certificate of counsel of record stating that it is made in good faith.

28 U.S.C. § 455(a)

Any justice, judge, or magistrate of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.

28 U.S.C. § 455(b)(1)

He shall also disqualify himself in the following circumstances:

(1) Where he has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding;

Rules

Bankruptcy Rule 2018(a): Intervention, Right to be Heard

(a) Permissive intervention. In a case under the Code, after hearing on such notice as the court directs and for cause shown, the court may permit any interested entity to intervene generally or with respect to any specified matter.